F.M.S. REPORTS.

[APPELLATE CRIMINAL JURISDICTION]
WHITLEY, AG. C.J., GORDON-SMITH
& CUSSEN, JJ.
February 9, 1938.

(1) PUBLIC PROSECUTOR v. ALANG MAT NASIR BIN ANJANG TALIB

(2) PUBLIC PROSECUTOR v. CHEN LIP.

[PERAK CRIMINAL APPEALS Nos. 12 & 14 of 1937]

Evidence—charge of murder—exceptions under the Penal Code—insanity—onus probandi —observations on quantum of proof—Penal Code, S. 84; Evidence Enactment, ss. 3, 105.

In two cases tried before the Judge at the Ipoh Assizes without assessors the accused were convicted of murder. Medical evidence was given in each case as to the mental condition of the accused persons. In the first case the evidence showed that between 18th March 1924 and 15th February 1937 the accused was on five distinct occasions a temporary inmate of the Mental Hospital for periods of from two to three months, the diagnosis being either manic-depressive insanity, confusional insanity or senile dementia. In the other case, it was the opinion of the medical witness, who had the accused under observation at the Central Mental Hospital from the 1st June to the 12th August 1937, that the accused was suffering from confusional and delusional insanity whilst in hospital. The witness went on to say that he was sure that on the day of the alleged offence the accused was suffering from delusional insanity. The trial Judge came to the conclusion that in the first case the accused "probably did know the nature of the acts he was doing and that he was doing wrong" on the date when he committed the acts complained of against him and that in the second case the accused "knew full well the nature of the acts he was doing" and that it was far more likely than not that he knew that those acts were contrary to law at the time when he did them. Although he convicted the accused in both cases, the learned Judge referred to the Court of Appeal the question whether he was right in doing so.

Held, that while it is for the prosecution to prove its case beyond reasonable doubt, the burden of proving the existence of circumstances bringing the case within one of the exceptions contained in Section 84 of the Penal Code lies upon the accused. It is open to him to discharge that burden either by adducing himself or by relying upon the evidence adduced by the prosecution or by both these means. The burden of proof cast upon an accused to prove insanity is not so onerous as that upon the prosecution to prove the facts which they allege and may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendant in civil proceedings.

Held, further that the trial judge having found in each case that the evidence did raise a reasonable doubt in his mind as to whether or not the accused was insane when committing the acts complained of and such a doubt being based as it was upon a very definite and weighty expert medical opinion, and having regard to the lesser degree of proof required in such a case, the accused had discharged the burden cast upon them by section 105 of the Evidence Enactment and brought themselves within the exception provided by section 84 of the Penal Code.

REFERENCES to the Court of Appeal under section 55 of the Courts Enactment.

M. C. Hay, Deputy Legal Adviser, for the Public Prosecutor.

J. L. Woods, for the Respondents.

Cur. Ad. Vult.

WHITLEY, AG. C.J.—These two references to the Court of Appeal under section 55 of the Courts Enactment raised the same point of law and were by consent heard together. They arose out of two cases tried by Aitken J. without assessors at the Ipoh Assizes. In the first case the accused was charged with causing mischief by fire and with causing hurt. The last witness called by the prosecution was Dr. Murdoch who is the Medical Superintendent at the Central Mental Hospital. He gave evidence as to the accused's mental condition from which it appeared, *inter alia*, that between the 18th March, 1924 and the 15th February 1937 he was on five distinct occasions a temporary inmate of the Mental Hospital for periods of from two to three months, the diagnosis being either manic-depressive insanity, confusional insanity or senile dementia. In Dr. Murdoch's opinion the accused is on his way to complete dementia. The learned Judge pronounced a verdict of guilty, because he thought that the accused "probably did know the nature of the acts he was doing and that he was doing wrong" on the date when he committed the acts charged against him. The question which he reserved for this Court was "whether he was right in law in convicting, in view of the reasonable doubt which existed in his mind as to whether the accused was or was not insane on the date when he committed those acts."

In the second case the accused was charged with voluntarily causing grievous hurt on the 7th May 1937.

Dr. Murdoch, called as a witness for the defence, stated that he had the accused under observation at the Central Mental Hospital from the 1st June to the 12th August 1937. He formed the opinion that he was suffering from confusional and delusional insanity whilst in the hospital, and went on to say that he was sure that on the date of the alleged offence the accused was suffering from delusional insanity, and that it was possible that he was also suffering from confusional insanity on that date. The learned Judge was satisfied that the accused "knew full well the nature of the acts he was doing," and thought it "far more likely than not that he knew that those acts were contrary to law at the time when he did them"; but on the other hand Dr. Murdoch's evidence had raised a reasonable doubt in his mind as to whether the accused did know that what he was doing was contrary to law. He convicted the accused, but referred to this Court the question whether he was right in so doing.

Pending our decision both accused were remanded in custody.

The question raised by both references is then shortly this:—

> "If upon the whole of the evidence the Court is of the opinion that there is a reasonable doubt as to whether the accused was insane at the time that he committed the act alleged against him, ought the Court to convict or ought the Court to find that he committed the act but is not guilty because he was of unsound mind at the time."

In considering what our answer to this question should be it is important that we should bear in mind that in the Federated Malay States we are governed by our Codes and Enactments and that, whilst the main principles which we have to apply in administering our Criminal Law are substantially the same as those which are applied by the Courts in England, it is unsafe to follow the English cases without considering whether and to what extent expressions used in those cases may have to be varied, modified or adapted to comply with the provisions of these Codes and Enactments. For example the expression "reasonable doubt" which occurs in this reference, and indeed in practically every criminal trial, is not used in any of the relevant sections of the Evidence Enactment to which I shall shortly refer; but upon a careful consideration of those sections it will, I think, be found that the framers of our Enactment had in mind the idea conveyed by that expression and merely sought to codify it by using more precise words. In order to avoid any possible confusion it will I think be safe to adhere as closely as possible to the wording of our sections.

Before, however, proceeding to consider those sections, it may be useful, by way of introduction, to state shortly the well known broad principles which are of universal application in all criminal trials in England and the Dominions and countries such as this, where the administration of justice is founded upon the English system. It is for the prosecution to prove its case beyond reasonable doubt. If it fails to do that the accused is entitled to be acquitted. The accused starts off with the presumption of innocence in his favour, but when once the prosecution has proved beyond reasonable doubt facts which, if unanswered, would establish the charge against the accused, it is for the accused, if he wishes either to excuse himself altogether or to reduce his offence to one of lesser gravity, to adduce evidence directed to one or other of those objects. Upon the evidence as a whole the Court decides the case.

The first relevant section of our Evidence Enactment is section 101 which reads:—

> "(1) Whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> *Illustrations.*
>
> (a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.
> A must prove that B has committed the crime.

This section and the illustration lay it down that in a criminal trial the burden of proof lies upon the prosecution.

The next section which bears upon this reference is section 105 which reads as follows:—

> "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.
>
> *Illustrations.*
>
> (a) A accused of murder alleges that by reason of unsoundness of mind he did not know the nature of the act. The burden of proof is on A.
>
> (b) A accused of murder alleges that by grave and sudden provocation he was deprived of the power of self-control. The burden of proof is on A.
>
> (c) Section 325 of the Penal Code provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt shall be subject to certain punishments.
> A is charged with voluntarily causing grievous hurt under section 325.
> The burden of proving the circumstances, bringing the case under section 335 lies on A.

Read together these two sections are in effect a codification of the English law as to the burden of proof in criminal trials, but they afford no indication as to what is meant by "proving" and what degree of proof is required.

This all important question is dealt with in section 3 of the Enactment in which we find the following definitions:—

> " A fact is said to be *proved* when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists;
>
> A fact is said to be *disproved*, when, after considering the matters before it, the Court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist;
>
> A fact is said to be *not proved* when it is neither proved nor disproved.

The answer which we give on this reference must, I think, depend upon the construction which we put upon the provisions of section 3 and section 105; but it is to be noted that the definitions in section 3 are so worded as to render possible a reasonable degree of elasticity in applying them, and when considering how we should apply them in any particular case, it is proper that we should invoke the assistance of authoritative decisions in England.

In the two cases which we have under consideration the accused sought to avoid responsibility on the ground of what is loosely but conveniently described as insanity, by bringing themselves within the exception contained in section 84 of the Penal Code which provides that nothing is an offence which is done by a person who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. The burden of proving the existence of circumstances bringing the case within that exception was upon the accused in each case. It was open to them to discharge that burden either by adducing themselves or by relying upon evidence adduced by the prosecution or by both these means. Whether or not they have discharged that burden must depend upon the view which the learned trial Judge took upon considering the evidence as a whole. Section 3 indicates the way in which consideration of that question should be approached. He should put himself in the position of the prudent man, and ask himself whether under the circumstances of each case he ought to act upon the supposition that the accused was insane within the meaning of section 84 of the Penal Code. One of the circumstances which he ought to take into account is the fact that it is the defence and not the prosecution which is seeking to prove the fact of insanity. It is well established, as the result of the accumulated wisdom of many great English Judges, that the burden of proof resting upon an accused to prove insanity, or indeed any circumstance which may excuse him or reduce the gravity of his offence, is not so onerous as the burden of proof resting upon the prosecution to prove the facts which they have to establish. As Viscount Hailsham L.C. observed in delivering the judgment of the Privy Council in the case of *R.* v. *Sodeman*, 1936 A.E.L.R. 1138, the burden in cases in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendant in civil proceedings.

In a civil action the merest tipping down of the scales in one direction or the other may be sufficient to decide the issue. A prudent man, called upon to decide upon a matter in which so much is at stake, would act wisely and properly in allowing himself to be guided by an authoritative opinion such as that; and a Judge sitting without assessors ought to direct himself to that effect just as a Judge sitting with assessors or a jury would direct them that that is the standard which they should apply. When framing the question which he referred for our determination in the two cases which we are considering, the learned Judge apparently had not in mind the definition of "proved" in section 3, but he found in each case that the evidence did raise a reasonable doubt in his mind as to whether or not the accused was insane when committing the act complained of; and it seems to me that a prudent man, feeling such a doubt as that based as it is upon such a very definite and weighty expert medical opinion, and bearing in mind the lesser degree of proof required in such a case and the consequences which depended upon his decision, would consider the existence of insanity so probable—and I think the word "so" here must be read in the sense of "sufficiently"—that he ought under the circumstances to act upon the supposition that insanity existed. That being so the "fact" of insanity has in my opinion been "proved" within the definition in section 3, and the accused has discharged the burden cast upon him by section 105. He has accordingly brought himself within the exception provided by section 84 of the Penal Code, and is entitled to be acquitted on the ground of insanity and dealt with in accordance with the provisions of section 348 of the Criminal Procedure Code.

In coming to this conclusion I have not lost sight of the fact that the learned Judge, whilst feeling a reasonable doubt in both cases, expressed opinions which showed that he regarded the scales as being weighed down more on the side

of sanity than of insanity. In the one case he thought that the accused probably did know the nature of the acts and that he was doing wrong; and in the other he thought that it was far more likely than not that the accused knew he was doing wrong. It was urged by the learned Deputy Legal Adviser, and with much force, that a prudent man who had arrived at such conclusions as to the preponderance in favour of sanity would assume that insanity did not exist. It may well be that some prudent men would take that view and some the other view; but regard must be had to the "circumstances of the case," and my strong personal view is that in the particular circumstances of these two cases, there are to be found in the medical evidence such substantial grounds for the reasonable doubt as to sanity, that the average prudent man would feel it his duty to act upon the supposition that insanity did exist. I feel no doubt in my mind that if I were a member of a Jury called upon to decide these cases on the evidence contained in the two records, that is the view which I should take.

The learned Judge apparently felt that in view of the fact that he thought sanity more probable than insanity he ought to convict. As I have indicated I do not think that is necessarily so. The answer depends entirely upon the result of the application of the test laid down in section 3 to the circumstances of the particular case.

That answers the question referred to us in these two cases, but I think it is desirable that I should go on to deal with two other matters which arise out of the arguments addressed to us.

It was suggested that in England, by reason of the rules in *McNaghten's case*, (1843) 10 Cl & Fin 100, the defence of insanity stands on an entirely different footing from other defences, such as provocation and sudden quarrel, which are available to an accused person, and demands from him a higher degree of proof than is required in the case of such other defences. Whether or not, in view of recent decisions such as that in *Sodeman's case* (*supra*), that can still be taken to be the state of the law in England does not concern us here, but it seems to me clear that in these States there is no distinction whatsoever between the various exceptions provided by our laws in so far as the questions of burden of proof and degree of proof required are concerned. Section 105 is comprehensive in its wording. It refers to the burden of proving circumstances bringing the case within "any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same code." That puts the defence of insanity under section 84 on precisely the same footing as the defence of grave and sudden provocation under Exception 1 to Section 300. Accordingly where the defence of provocation is set up in a murder case, the direction to the assessors should be on the same lines as that which I have already suggested would be proper in the case of a defence of insanity. The burden of establishing grave and sudden provocation within the wording of the exception is upon the accused. In seeking to prove it he may extract much that will assist him out of the evidence of prosecution witnesses who may, for example, depose to blows aimed at him. He may himself give evidence as to such provocation. If on the evidence as a whole the assessors feel that the probability of there having been grave and sudden provocation is such that under the circumstances a prudent man ought to act upon the supposition that there was such provocation, then the accused will have discharged the burden of proving and brought himself within the exception. In such a case it seems to me that a prudent man who felt a reasonable doubt as to whether or not there had been grave and sudden provocation would give the accused the benefit of such doubt, and find that there had been provocation.

We were referred to the well known case of *Woolmington* v. *Director of Public Prosecutions*, (1935) A.C. 462. In that case the charge was one of murder, and the defence set up was accident. There was no question of insanity. The facts were accordingly in no way comparable to those of the two cases which are the subject matter of these references, but the development and present state of the law as to burden of proof in criminal trials was so exhaustively dealt with by the House of Lords in the judgments in that case, and these judgments are so frequently referred to in the Courts of these States, that it is important to consider to what extent, if any, the decision and expressions of opinion of the noble Lords in that case are inconsistent with the law as administered out here. I would say at once that as I read these judgments they contain nothing in any way inconsistent with the law as laid down in our Codes and Enactments, and it seems to me that the principles laid down by Viscount Sankey L.C. afford a valuable guide to the correct interpretation of section 105 of our Evidence Enactment. Certain doubts which had previously existed as to the law in England and which were resolved and settled, probably once and for all, by that case had in fact been already met and dealt with by the framers of our Penal Code and Evidence Enactment, with the result that it would be impossible for a Judge here, properly directing assessors as to the law as laid down in our relevant sections, to express himself in the words with which fault was found in the summing up in that case. The passage in question reads as follows:—

> " The killing of a human being is homicide, however he may be killed, and all homicide is presumed to be malicious and murder, unless the contrary appears from circumstances of alleviation, excuse, or justification. 'In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him: for the law will presume the act to have been founded in malice until the contrary appeareth.' That has been the law of this country for all time since we had law. Once it is shown to a jury that somebody has died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy a jury that what happened was something else, something which might be alleviated, something which might be reduced to a charge of manslaughter or was something which was accidental, or was something which could be justified."

There was, as pointed out by Lord Sankey, apparent authority for the law as thus laid down. The phrase "presumption of malice" occurs in *Foster's* Crown Law written in 1762, and is repeated in *Archbold* and *Russell* on Crimes, and finally appears in *Halsbury's* Laws of England which purports to state the law as on May 1st, 1933 in the following form:—

> " When it has been proved that one person's death has been caused by another, there is a *prima facie* presumption of law that the act of the person causing the death is murder, unless the contrary appears from the evidence either for the prosecution or for the defence. The onus is upon such person when accused to show that his act did not amount to murder."

I extract passages from Lord Sankey's judgment which state most clearly what their Lordships held to be the true state of the law:—

> " At the end of the evidence it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt. Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.
>
> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. When dealing with a murder case the Crown must prove death as the result of a voluntary act of the accused and malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked.
>
> " When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted. It is not the law of England to say, as was said in the summing-up in the present case: 'If the Crown satisfy you that this woman died at the prisoner's hands then he has to show that there are circumstances to be found in the evidence which has been given from the witness box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing it was a pure accident. If the proposition laid down by Sir Michael Foster or in the summing-up in *Rex* v. *Greenacre* means this, those authorities are wrong."

As I have already pointed out a summing-up such as that would amount to a misdirection under our

Laws. Section 101 of the Evidence Enactment throws the burden on the prosecution to prove the guilt of the accused. Nowhere in the Enactment is there any suggestion that *that* burden ever shifts. Section 105 merely says that if the accused seeks to establish certain circumstances the burden of proving *those* circumstances is upon him. In order to discharge the burden of proof which the prosecution has undertaken, it has to prove every ingredient which goes to make up the offence charged. Those ingredients are set out with the utmost clarity and particularity in the Penal Code, and the ingredient of what in England is called "malice" is dealt with comprehensively and in great detail in sections 299 and 300. The Code and the Enactment read together leave no shadow of doubt that the burden is on the prosecution throughout to prove malice just as much as any other ingredient of the offence.

So much for the burden of proof which is upon the prosecution. In my opinion it is on a proper reading of our Laws the same here as is now laid down in England by the *Woolmington* decision. As regards the burden which is under certain circumstances cast upon the accused, and the nature of that burden, it follows from what I have already said, when analysing sections 3 and 105 of the Evidence Enactment, that in my opinion there is nothing in our law on this point which is inconsistent with the principles laid down in the *Woolmington* judgment.

The judgment of the Court on the references (by a majority) will be that in each case the finding should be that the accused committed the act or acts charged against him but that at the time at which he is alleged to have committed the offence he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence or that it was wrong or contrary to law; and that an order to keep in safe custody should be made in accordance with the provisions of section 348 (i) of the Criminal Procedure Code.

GORDON-SMITH, J.—These two references were taken together, the question referred by the learned Judge being exactly the same in each case.

This question is as to the proper construction to be placed upon the expression "burden of proving" as used in S.105 of the Evidence Enactment and whether such means no more than that an accused is under the burden of adducing evidence sufficient to raise a reasonable doubt as to his sanity at the time of the commission by him of an offence alleged against him under the Penal Code.

In both cases the medical evidence was such as to raise a reasonable doubt in the mind of the learned Judge as to the sanity of each accused and it matters not whether such medical evidence was produced by the prosecution or by the accused. In the one case the accused was unrepresented and the Prosecution quite properly produced medical evidence on the point of that accused's sanity which, if the accused had been represented would, no doubt, have been called for the Defence. In the other case, the accused was represented by Counsel and similar medical evidence was called for the Defence after the close of the case for the Prosecution.

It is upon the evidence as a whole, whether produced by the Prosecution or Defence that a decision rests and if on the evidence produced by the prosecution alone a reasonable doubt exists, then the prosecution has not discharged the onus of proving the charge against an accused and an acquittal must follow.

It is not, however for the Prosecution, once having established beyond reasonable doubt a *prima facie* case against an accused, to produce evidence which will bring an accused within any of the general exceptions (specifically stated in the Penal Code) and similarly in a homicide case, it is for the accused to prove facts which will either excuse altogether the act of the accused or will at least lessen his culpability. For example in cases where accident, self defence, grave and sudden provocation are alleged, the burden of proving such, is on the accused once the prosecution has established a *prima facie* case. Similarly in regard to insanity. The law (Penal Code, Section 84) presumes an accused person to be sane until the contrary is proved and the burden of proving insanity is, as in the case of accident, self defence, grave and sudden provocation, on the accused. This is exemplified by S.105 of the Evidence Enactment which reads as follows:—

> "When a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Penal Code or within any special exception or proviso contained in any other part of the same code, or in any law defining the offence is upon him, and the Court shall presume the absence of such circumstances."

Before proceeding further however, this Court desires to emphasize the fact that this obligation which is placed upon an accused person only arises if and when the Prosecution has already established beyond reasonable doubt a *prima facie* case against the accused and upon which and without further evidence or explanation by the defence, the Court would be entitled to convict.

The quantum of such proof is another matter. In this connection Section 3 of the Evidence Enactment is relevant. Under this section " A fact is said to be *proved* when after considering the matter before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists." Similarly " A fact is said to be *disproved* when after considering the matters before it, the Court either believes that it does not exist or considers its non-existence so probable that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it does not exist."

And " A fact is said not to be proved when it is neither proved nor disproved."

In my opinion in considering the effect of Sections 101 to 106 inclusive and the words "burden of proof," regard must be had to these definitions. The words "under the circumstances of the particular case" are wide and mean what they say and therefore in considering whether an accused has or has not proved a particular fact, the burden of proof of which may be on him, regard is not limited solely to the evidence adduced by him in reference to this particular fact and the whole circumstances of the particular case as evidenced both by the prosecution and the defence come under consideration.

In the cases under review the learned Judge expressly finds that he has a reasonable doubt as to the sanity of both accused at the time they committed the acts. If on considering the evidence against the accused there is a reasonable doubt about his guilt, in consequence, the case against him is considered to be not proved and the accused is entitled to be acquitted; on the other hand, if by evidence for the defence, or in fact on evidence either for the prosecution or defence, a reasonable doubt arises as to whether a fact, the burden of proving which is on the accused, has been proved this does not mean that such fact has not been proved and that therefore the accused has not discharged that obligation. It therefore follows that it is sufficient to ensure his acquittal for an accused to establish a reasonable doubt as to the existence of a fact, of which the burden of proof is upon him. Such applies not only to insanity but to all other general exceptions, special exceptions and provisoes of the Penal Code.

It would be highly undesirable for this Court to attempt to lay down or define any degrees or quantum of proof which should establish a reasonable doubt and as stated in Section 3 of the Evidence Enactment it depends on the circumstances of the particular case.

There is no necessity to go into the facts of the cases under review and it is sufficient to state that as the learned Judge found that on those facts there was a reasonable doubt in his mind as to the sanity of both accused at the time they committed the acts in question, it follows that both accused must be acquitted of the charges brought against them.

It is obvious from the records that the learned Judge had in mind the distinctions between medical and legal insanity and properly applied to this question the tests laid down in the McNaghtens Rules as to which there has been no authoritative extension or relaxation.

During the argument on appeal the following cases were referred to:—*Director of Public Prosecutions* v. *Woolmington.* A.C. 1935 p. 462. *Rex* v. *Sodeman,* A.E.L.R. 1936. Vol. 1138. W.N. 24 p.190. *Emperor* v. *Damapala,* A.I.R. April 1937. Part 280, Rangoon 83.

It does not necessarily follow that English criminal cases, even of the highest authority, are binding authorities on the Courts of this Territory, where the Criminal Law and Law of Evidence has been codified. It may be that in such codifications, distinctions and differences, however slight, may have, intentionally or unintentionally, crept in, which make it imperative for our Courts to follow the written as opposed to the unwritten law. Where, however, no such distinctions or differences can be found or in the absence of definite provisions in the written code then as, in the main, the principles on which both laws are founded are the same, decisions of the higher English Courts can safely and should be followed. Distinctions in some important details, can be found in the written law of murder and of evidence of this Territory and that of English Law. It is impossible therefore to apply isolated expressions to be found in the considered judgment of the Lord Chancellor in *Woolmington's* case to the law of murder as defined by the written code of this Territory. In effect, the main principles laid down in *Woolmington's* case have already been given effect to in the written code of this Territory by its definition of what constitutes murder and other provisions in regard thereto and it is for the prosecution to establish *a prima facie* case of murder as so defined.

In *Rex* v. *Sodeman* the question of the quantum of proof arose and it was definitely laid down that the burden of proof resting upon the accused to prove insanity was not as heavy as the burden of proof resting upon the prosecution to prove the facts which were alleged and that it might fairly be said that such burden was not higher than the burden resting on a plaintiff or defendant in civil proceedings.

The Rangoon case of *Emperor* v. *Damapala* was also examined and considered but I am unable to accept that case as an authority binding on this Court for the propositions therein contained relating to the meaning of "burden of proving" contained in Section 105 of the Evidence Enactment.

The result is that the learned Judge is directed to acquit both accused but should make the order for detention specified in Section 348 (1) of the Criminal Procedure Code and report the case to the Resident.

Since writing the above, I have had the advantage of reading the judgment of the Acting Chief Justice.

Such judgment sets out in greater detail and I think more clearly, the correct answer to the question raised by the trial Judge and I entirely agree with all that is set out in that Judgment. As however it is a majority decision of the Court, it is desirable that my own opinion should be expressed.

CUSSEN, J.—These two references present for determination by this Court one question of law—the same question having presented itself in both the trials.

This question is as to what is the true construction of Section 105 of the Evidence Enactment, and in particular what is the meaning of the expression "Burden of proving" therein

Section 105 reads:—

> When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

The burden which these words place upon an accused is to *prove the existence* of the particular facts required by the exception in question.

When can he claim to have proved the existence of such facts?

The answer is when he has satisfied what is required by the definition of "proved" in Section 3 of the Enactment.

The following definitions in Section 3 are relevant to the consideration of the present question:

> "*Proved*—a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.
>
> *Disproved*—A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.
>
> *Not proved*—A fact is said not to be proved when it is neither proved nor disproved.
>
> *Shall presume*—Whenever it is directed by this Enactment that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved."

Now the first observation I make upon the definition of "proved" is that the words "so probable" mean only "probable to such a degree (whatever that may be)"—the "so" has no intensive force.

Secondly the word "probable" is used in its ordinary, common, everyday sense; it is not a technical word or a term of art; the definition is not concerned with "probability" in the sense of the mathematical theory of probabilities; the definition is one for the ordinary "prudent" man.

The prudent man when he says that it is probable that a fact exists means that there is a likelihood of its existence, that the balance of probability is in favour of its existence.

The first requirement, therefore, of the definition of "proved" is that the effect of the matters before the Court must be to establish some degree of probability that the fact alleged exists.

What is this necessary degree of probability?

Is it possible to lay down any general rules for the guidance of the prudent man who has to decide this question?

The first general rule, which may be stated is that, when the burden of proving a fact in issue or relevant fact is upon the prosecution the evidence must create such a high degree of probability as to exclude any reasonable doubt as to the existence of the fact alleged.

But when the burden of proving a fact is upon the accused it suffices if the effect of the evidence relied upon is to make it probable, even

in the very slightest degree, that the fact alleged exists.

The question the prudent man must ask himself is—is it in any degree probable, is there any probability, however slight, that the fact exists? If the answer is "yes" then the fact is proved.

Such a low degree of probability does not of course exclude a reasonable doubt of the existence of the fact.

In all cases, therefore, to which Section 105 applies, where the burden is placed upon the accused of proving the facts necessary to establish a defence of a general exception, a special exception, or a proviso, the proper question for the Court, at the close of the case, after hearing all the evidence, is whether there is any probability, however slight it may be that the facts alleged did exist.

If the answer is "yes" then the fact is proved, and the fact presumed under Section 105, i.e. the absence of the circumstances alleged in defence, is disproved; if the answer is "no" it is irrelevant to add "but I have a reasonable doubt as to whether or not the fact existed."

If the Court finds itself in such an inconclusive state of mind that it is unable to answer the question either affirmatively or negatively, then the case comes within the meaning of "not proved." But this position should not arise in a criminal trial on an issue of fact where the burden of proving such is placed upon the accused. It is not the act of a prudent man to hold the scales so delicately and exactly as against an accused person.

For a defence to succeed, what is required by Section 105 is that the necessary facts be proved, and the definition of "proved" requires a positive, affirmative conclusion, in the sense which I have explained.

The principle of prudence, of wisdom, underlying the wide difference between the degree of probability required from the prosecution and that from an accused is that contained in the familiar saying that it is better that many guilty men should go unpunished than that one innocent person should be wrongly convicted.

I find support for the views I have set out in the judgment of the Privy Council in *Sodeman* v. *R.* (2 A.E.R. 1138).

That was an appeal from Australia against a conviction for murder. The defence was insanity and, in the argument, the question arose as to the weight of the burden of proof resting upon an accused to prove insanity.

The Judgment was delivered by Viscount Hailsham L.C. who, on that point, says,

> "In fact there is no doubt that the burden of proof for the defence is not so onerous, (as that resting on the prosecution). It has not been very definitely defined. The Canadian case of *Rex* v. *Clark* was referred to, but even there the Judges were not able to find a very satisfactory definition, but it is certainly plain that the burden, in cases in which the accused has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendant in civil proceedings. That this is the law is not challenged...."

The rule in civil proceedings is that the plaintiff (or the defendant, where the burden is upon him) has discharged the burden of proof upon him if he establishes a balance of probability in his favour.

There is no difference in Section 105 between the exception of insanity (Section 84 Penal Code) and the other exceptions and provisoes to which the Section refers; the burden of proof on the accused is the same in all cases.

It is not necessary, in my opinion, for the purpose of this reference, to examine the Judgment in the case of *Woolmington* v. *Director of Public Prosecutions* (A.C. 1935 p. 462) for that judgment expressly excepts from its purview not only the defence of insanity but all statutory exceptions; and Section 105 of the Evidence Enactment deals with statutory exceptions.

As regards the case to which the attention of the Court is invited in this reference i.e. *Emperor* v. *Damapala* (A.I.R. April, 1937, Part 280, Rangoon p. 83) it is sufficient for me to state that I cannot accept the proposition that in Section 105 of the Evidence Enactment the words "burden of proving" mean no more than that the accused must produce some evidence, nor (if this is the true interpretation of the Judgments therein) that it is sufficient if the evidence raises a reasonable doubt as to whether or not the circumstances necessary to bring the accused within the particular exception existed.

Dunkley J. in his judgment says:—

> "The duty of the accused under Section 105 is *to introduce* such evidence as will displace the presumption of the absence of circumstances bringing the case within an exception and will suffice to satisfy the Court that such circumstances *may* have existed."

Unless the word "may" is used to imply some probability I do not agree with this proposition. Nor of course is it correct to say that the accused must introduce the necessary

evidence; he may find it, in whole or in part, in the evidence given by the prosecution.

I have now stated my view of the general question of law raised by these two references.

The application of the principles I have endeavoured to expound to the particular cases which gave occasion for these references is of course a matter for the trial Court. However, it is, I think, quite evident from the judgments that the learned trial Judge has applied, in essentials these principles in convicting the accused, although he has put questions to himself which, in my opinion are an inversion of the proper questions. He says "I also think it far more likely than not that he knew that those acts were contrary to the law at the time when he did them" which is an answer to the question—is it likely that he knew that these acts were contrary to law.

The proper question is:—is it likely that he did *not* know that these acts were contrary to law?

Again, in the other reference, the Judgment states "I think he probably did know (1) the nature of the acts he was doing and (2) that he was doing wrong." Whereas I consider the form of the finding should be:—it is not probable that he did not know the nature of the acts he was doing and that he was doing wrong.

In my opinion the accused in both cases were properly convicted.

Judgment accordingly.